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Supreme Court of the United States

OCTOBER TERM, 1965

No. 952

ARO MANUFACTURING CO., INC., ET AL.,
PETITIONERS,

v.

AUTOMOBILE BODY RESEARCH CORP.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND MOTION FOR LEAVE TO USE RECORD IN 365 U.S. 336 AND 377 U.S. 476

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INDEX

	Page
Motion for leave to use record in 365 U.S. 336 and 377 U.S. 476	1
Citations to opinions below	2
Jurisdiction	3
Questions presented	3
Constitutional provisions involved	5
Statutory provisions involved	6
Federal rules of civil procedure involved	6
Statement	7
Reasons for granting the writ	14
Conclusion	24
Appendix A — Opinion below	25
B — Statutes involved	31
C — Judge Wyzanski's statement of Massachusetts decisional law	33

CITATIONS

Cases

Aro Mfg. Co. v. *Convertible Top Co.*, 365 U.S. 336	1, 4, 24
Aro Mfg. Co. v. *Convertible Top Co.*, 377 U.S. 476	1, 2, 4, 23, 24
Arrowsmith v. *United Press International*, 320 F.2d	22, 23
Bertha Bldg. Corp. v. National Theatres Corp., 248 F.2d 833	17, 18
Canuel v. *Oskoian*, 23 F.R.D. 307	18
Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273, U.S. 359	14, 15, 16
Echeverry v. *Kellog Switchboard & Supply Co.*, 175 F.2d 900	22
Erie R.R. Co. v. *Tompkins*, 304 U.S. 64	22

Page

Gibbs v. *Buck*, 307 U.S. 66 ..... 18, 19
Gilbert v. *David*, 235 U.S. 561 18
Guisti v. *Pyrotechnic Industries*, 156 F.2d 351 ..... 16, 17
Haleiwa Theatre Co. v. *Forman*, 37 F.R.D. 62 18
International Shoe Co. v. *Washington*, 326 U.S. 310 22, 23
Jet Mfg. Co. v. *Sanford Ink Co.*, 330 Mass. 173 21
K. Shapiro, Inc. v. *New York Central R.R.*, 152 F. Supp. 722 22
K.V.O.S. Inc. v. *Associated Press*, 299 U.S. 269 18
Land v. *Dollar*, 330 U.S. 731 18
McGhan v. *F. C. Hayer Co.*, 84 F. Supp. 540 18
McNutt v. *General Motors Corp.*, 298 U.S. 178 18
Noerr Motor Freight Co. v. *Eastern R.R. Presidents Con.*, 113 F. Supp. 737 18
Radio Shack Corp. v. *Lafayette Radio Electronics Corp.*, 182 F. Supp. 717 ..... 13, 20, 33
Riverbank Laboratories v. *Hardwood Products Corp.*, 350 U.S. 1003 22
Rudolph v. *Eisen*, 38 F. Supp. 868 18
Schmikler v. *Petersime Incubator Co.*, 77 F. Supp. 11 21
Scholnik v. *National Airlines*, 219 F.2d 115 21
United States v. *Scophony Corp.*, 333 U.S. 795 ..... 15, 16
Wetmore v. *Rymer*, 169 U.S. 115 18
Wyshak v. *Anaconda Copper Mining Co.*, 328 Mass. 219 21

Constitution and Statutes

U. S. Const.:
Amend. V 5, 17
Amend. VII 5, 18
28 U.S.C. § 1254(1) 3
28 U.S.C. § 1391(c) 6, 31
Clayton Act:
§ 4, 38 Stat. 730, 15 U.S.C. § 15 ..... 6, 31

Page

§ 12, 38 Stat. 736, 15 U.S.C. § 22 . . . . . 6, 13, 14, 15, 31

MASS. GEN. LAWS:

ch. 181 § 3A 6, 20, 32

ch. 223 § 37 . . . . . 6, 21, 32

§ 38 . . . . . 6, 21, 32

Miscellaneous

FED. R. CIV. P. 4(d)(3) 6, 23

4(d)(7) 6, 23

2 MOORE, FEDERAL PRACTICE 1176 23

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No.

ARO MANUFACTURING CO., INC., ET AL.,
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v.

AUTOMOBILE BODY RESEARCH CORP.,
RESPONDENT.

MOTION FOR LEAVE TO USE RECORD IN 365 U.S. 336 and 377 U.S. 476

Petitioners, Aro Mfg. Co., Inc. and Aro Top Sales Co. respectfully move for leave to use the record in *Aro Mfg. Co.* v. *Convertible Top Co.*, 365 U.S. 336 and 377 U.S. 476. The questions presented in the following petition relate largely to circumstances established by the record before the Court in 365 U.S. 336 and 377 U.S. 476. In particular, the record previously before the Court establishes many of the facts set forth in the complaint and counteraffidavit comprising the record in the courts below.

Respectfully submitted,

DAVID WOLF
CHARLES HIEKEN
Counsel for Petitioners

Supreme Court of the United States

OCTOBER TERM, 1965

No.

ARO MANUFACTURING CO., INC., ET AL.,
PETITIONERS,

v.

AUTOMOBILE BODY RESEARCH CORP.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Aro Manufacturing Co., Inc. and Aro Top Sales Co. (Aro hereinafter) pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on November 9, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the Massachusetts District Court (R. 20-21)[1] is reported in 240 F. Supp. 805, 145 U.S.P.Q. 61. The

[1] The printed record to which reference is made in this petition includes three volumes previously before the Court in No. 21 O.T. 1960, 365 U.S. 336 containing pages 1-403, 405-622 and 623-656,

opinion of the Court of Appeals, printed in Appendix A hereto, *infra* 25-30, is reported in 352 F.2d 400.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1965. *Infra* 25-30. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

Petitioners Aro of Massachusetts brought suit against respondent Automobile Body Research Corporation (AB hereinafter), Convertible Top Replacement Co. (CTR hereinafter) and General Motors Company demanding a jury trial of all issues relating to alleged violations of federal antitrust and Massachusetts laws. Aro alleged in the complaint that AB and CTR do business in Massachusetts, setting forth how AB solicited, directly and through CTR, royalty payments from Massachusetts citizens on the sale of unpatented replacement fabrics. AB did not answer but filed a motion to dismiss, and the District Court granted the motion to dismiss for lack of jurisdiction. The Court of Appeals affirmed.

AB, a patent holding corporation of Maryland, had demanded royalty payments from Aro on the sale of unpatented replacement fabrics for convertible automobile folding tops. In April 1956, about two years after Aro had refused that demand, CTR was formed as a Maryland corporation, AB assigned to CTR a "Massachusetts Territorial Grant" in only one of the two convertible automobile folding top combination patents AB owned, and CTR com-

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respectively, and a fourth volume before the Court in No. 75 O.T. 1963, 377 U.S. 476 containing pages 1-94. Reference to the first three volumes is by a respective Roman numeral—"I:", "II:" and "III:" and reference to the fourth volume is by "75:". Reference to the record printed for the use of the court below containing pages 1-23, nine copies of which have been filed, is by "R.".

menced suit against Aro in the Massachusetts District Court. *Aro Mfg. Co.* v. *Convertible Top Co.*, 365 U.S. 336 (1961), 377 U.S. 476 (1964). After CTR had obtained an injunction in the Massachusetts District Court prohibiting the sale of the unpatented fabrics, AB licensed another Massachusetts replacement fabric manufacturer to sell the unpatented fabrics under both of AB's combination patents.

Aro sought to bring AB before the Massachusetts District Court by serving CTR's Massachusetts attorney in the still pending suit against Aro and by serving the Massachusetts Commissioner of Corporations under the Massachusetts substituted service of process statute.

The questions presented are:

1. Whether AB is subject to suit in Massachusetts on federal and state causes of action arising from activities which include soliciting and collecting royalty payments from Massachusetts citizens, and the bringing of suit in Massachusetts against Aro through its alleged alter ego, CTR under the "Massachusetts Territorial Grant" conferred on CTR by AB in the month of April 1956 when CTR was formed and sued Aro.

2. Whether patent holding company AB, whose only business can involve patent licensing, suing on patents and transferring rights under patents "transacts business" and is therefore amenable to suit under the Clayton Act in Massachusetts when it licenses a Massachusetts replacement fabric manufacturer, transferred a "Massachusetts Territorial Grant" to CTR so that the latter could sue Aro, transferred the rest of the territorial rights in the patent to CTR after the interlocutory judgment of the Massachusetts District Court was affirmed, received authority from CTR to grant licenses to others under the CTR "Massachusetts Territorial Grant" and continuously pressed the suit against Aro through its alleged alter ego CTR.

3. Whether AB has an agent in Massachusetts and is therefore amenable to suit under the Clayton Act there when the sole business of CTR, the alleged co-conspirator of AB, has been pressing the suit in Massachusetts against Aro under the "Massachusetts Territorial Grant" received from AB and otherwise helped AB collect royalty payments on the sale of unpatented fabrics.

4. Whether Aro was denied its constitutional right to trial by jury preserved by the Seventh Amendment when the judges apparently found that AB had no agent in Massachusetts and was not doing or transacting business in Massachusetts.

5. Whether Aro was deprived of property without due process of law in violation of the Fifth Amendment when the courts below ignored the allegations in the complaint and refused to draw the most favorable inferences to Aro from these allegations and from Aro's affidavit in dismissing the complaint against AB before AB answered and without trial.

6. Whether the courts below should have applied Massachusetts or federal law in deciding whether AB did business in Massachusetts for the purpose of determining whether AB was properly served when the U.S. Marshal served the Massachusetts Commissioner of Corporations and CTR's Massachusetts attorney.

7. Whether Massachusetts or federal law governs whether the Massachusetts District Court had jurisdiction over AB for the state cause of action independently supported by diversity of citizenship and the requisite jurisdictional amount in controversy.

CONSTITUTIONAL PROVISIONS INVOLVED

No person shall . . . be deprived of . . . property, without due process of law . . . . U.S. CONST. amend. V.

In Suits at common law, where the value in controversy

shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. *Id.* amend. VII.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 15 U.S.C. Sections 15 and 22 of the antitrust laws, 38 Stat. 730, 736 (1914); 28 U.S.C. § 1391(c) (1964); and MASS. GEN. LAWS ch. 223, §§ 37, 38; ch. 181, § 3A. They are printed insofar as pertinent in Appendix B, *infra* 31-32.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

FED. R. CIV. P. 4(d)(3) reads as follows:

> Service shall be made as follows:
>
> (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

FED. R. CIV. P. 4(d)(7) reads as follows:

> Service shall be made as follows:
>
> (7) Upon a defendant of any class referred to in paragraph (1) [individual] or (3) [domestic or foreign

corporation or upon a partnership or other unincorporated association which is subject to suit under a common name] of this subdivision of this rule, it is also sufficient if the summons and complaint are served in a manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

STATEMENT

Aro alleged that AB, a patent holding company whose principal assets are two combination patents covering convertible automobile folding top mechanisms (75:19; I:101; R. 16), *infra* 26, had licensed and collected royalties from a Massachusetts licensee (R. 15-16; 75:32, 40-48) and brought suit in Massachusetts against Massachusetts citizens Aro through CTR under only a Massachusetts Territorial Grant in only one of the two AB combination patents (R. 5-6; I:7). Without mentioning these allegations the Massachusetts District Court held that AB's attempt to collect royalties from a Massachusetts corporation for alleged infringement of its patents did not constitute the doing of business within the meaning of the Massachusetts statute authorizing service of process on the Commissioner of Corporations (R. 20-21). Accordingly, the District Court concluded that it had no jurisdiction over AB for causes of action arising under federal antitrust laws or the laws of Massachusetts and entered judgment dismissing the complaint against AB (R. 21). The jurisdiction of the District Court was invoked because the case arose under the federal antitrust laws and because there was diversity of citizenship and the requisite jurisdictional amount in controversy for the cause of action arising under Massachusetts law.

The complaint demanded a trial by jury of all issues (R. 3).

The complaint charged patent holding company AB with asserting its two convertible automobile combination patents, neither of which covers convertible automobile replacement top fabrics (R. 5; II:576-78, 594-95), 365 U.S. at 339, against those who sold the unpatented replacement fabrics (R. 3-4; *E.g.*, I:31-32; II:473-74, 511-12, 617-22; 75:18-20, 22-23, 32, 40-48).

The complaint alleged that AB does business in Massachusetts (R. 3). From the complaint it may be inferred that a substantial part of the alleged wrongful conduct of AB occurred in Massachusetts and affected Aro's business in Massachusetts.

10. In 1954 Automobile Body demanded royalties from Aro, but Aro, after consulting a patent attorney, refused to pay [II:473-76]. After Atlas complained to Automobile Body that its competitors, including Aro, were not paying royalties on the sale of unpatented replacement fabrics [75:32], Automobile Body decided to sue Aro, hoping that bringing suit would scare Aro and other manufacturers of replacement fabrics into paying royalties. Automobile Body also wrote threatening letters to customers of "unlicensed" fabric manufacturers, telling them that they could avoid "infringement" if they bought their requirements for unpatented fabrics from Atlas [75:22-23]. Some of these customers stopped buying from Aro.

11. Instead of suing Aro directly through Automobile Body, the real parties in interest, who include patent lawyers William D. Hall, Elliott I. Pollock and Nelson Moore, lawyer Richard Wright, and others based on information and belief, formed co-defendant

Convertible Top as a shell corporation to sue Aro. They made Elliott Pollock's wife, Vivian, the president and one shareholder and made Automobile Body's accountant Norman Quible, another shareholder and treasurer. They used Mr. and Mrs. Pollock's home address in Chevy Chase, Md. as the address of this suing corporation. Then Automobile Body, the licensing corporation, assigned a "Territorial Grant" in only the Mackie-Duluk combination patent and limited to Massachusetts, Aro's home state, to Convertible Top, the suing corporation. Automobile Body still owned all of the Ackermans patent and all the rights in the Mackie-Duluk patent to the rest of the United States. Then Convertible Top sued Aro on April 27, 1956 under the Mackie-Duluk patent, asking the court to stop Aro from selling unpatented fabrics for replacing worn ones in convertibles having mechanisms covered by the Mackie-Duluk patent. The formation of the suing corporation [75:13], the assignment of the "Territorial Grant [I:7]." and the filing of suit against Aro [I:1], all took place within the single month of April 1956 (R. 5-6).

Neither the District Court (R. 20-21) nor the Court of Appeals, *infra* 25-30, mentioned the allegations in the complaint.

Even after the 1961 decision of this Court, 365 U.S. 336, AB, according to the complaint, still demanded royalties from its six replacement fabric manufacturing "licensees" (R. 17) on the sale of unpatented replacement fabrics (R. 8), including its Massachusetts "licensee" (R. 16). Neither the District Court (R. 20-21) nor the Court of Appeals, *infra* 25-30, mentioned the existence of the licensing contract between AB and the Massachusetts licensee.

The Court of Appeals apparently accepted the allega-

tions in the affidavit of Richard Wright, the counsel (R. 16; 75:18) and treasurer of AB (R. 13-14), as true but treated allegations in the counteraffidavit by Aro's attorney as failing to prove that AB was doing or transacting business in Massachusetts or that CTR was anything more than a subsidiary of AB. *Infra* 29-30. The District Court made no findings on whether CTR was an agent of AB (R. 20-21). The Court of Appeals found "the record is devoid of proof" that CTR is the agent of AB. *Infra* 28.

The Court of Appeals mistakenly said that the counteraffidavit of the attorney for Aro states "on information and belief", *infra* 29, AB does business in Massachusetts directly by its attempts to license and licensing of manufacturers and sellers of unpatented replacement fabrics in classifying this statement under oath as a mere conclusory allegation.

The counteraffidavit actually states:

> 2. Defendant Convertible Top has acted in Massachusetts on behalf of Defendant Automobile Body Research Corp., hereinafter referred to as Automobile Body, for carrying out Automobile Body's business of obtaining revenues in Massachusetts under Automobile Body's alleged patent rights by seeking to obtain in said Civil Action 56-357-J an injunction against plaintiffs making and selling unpatented fabrics and seeking money from plaintiffs, and by conducting negotiations in Massachusetts offering a license agreement to the corporate plaintiff based on Automobile Body's patents. Paul V. Power, Esquire, of Gaston, Snow, Motley & Holt, Esquires, is the attorney for Convertible Top in Massachusetts in charge in Massachusetts of seeking said injunction and seeking said money.
>
> 3. Defendant Automobile Body itself directly has

done and does business in Massachusetts in attempting to license and licensing Massachusetts manufacturers and sellers of unpatented replacement fabrics. Automobile Body's patent attorney, William D. Hall, writing to the corporate plaintiff, hereinafter referred to as Aro and its counsel on behalf of Automobile Body, charged the corporate plaintiff in 1954 with infringement and contributorily infringing Automobile Body's Ackermans and Mackie-Duluk combination patents covering convertible automobile automatic folding top mechanisms by virtue of Aro's manufacture, installation and sale of unpatented replacement fabrics [II: 473-74]. Defendant Automobile Body has entered into an agreement effective April 1, 1959 with the Faulkner Manufacturing Company, a Massachusetts corporation making and selling unpatented replacement fabrics in Massachusetts, licensing Faulkner under said Ackermans and Mackie-Duluk patents to sell unpatented replacement fabrics [75:32, 40-48]. Upon information and belief said agreement is still in force, Automobile Body has received payments thereunder and Automobile Body, through its patent attorney William D. Hall, demanded royalty payments from Faulkner under said agreement even after the 1961 decision of the Supreme Court in said Civil Action (R. 15-16).

The U. S. Marshall's return of service states that service on AB was effected by serving the Massachusetts Commissioner of Corporations and Paul V. Power, Esquire (R. 11-12). So far as the record shows there is no one resident in Massachusetts having any higher authority over the Massachusetts business of CTR, (claimed by Aro to be the corporate agent of AB) other than Paul V. Power. The affidavit of AB's counsel denies that he or the other officers of AB received any service of process (R. 13).

The affidavit of AB's counsel (R. 13-14) does not contradict the allegations in the complaint (R. 2-11) nor the statements in the counteraffidavit by Aro's counsel (R. 15-19). It sets forth in three of its ten paragraphs that AB granted a patent license to General Motors Corporation, granted a license to Ford Motor Company and released Chrysler Corporation for past infringement (R. 13-14). Nothing in the affidavit of AB's counsel denies that AB entered into a licensing contract requiring the payment of royalties on the sale of unpatented replacement fabrics from one Massachusetts manufacturer and solicited royalty payments from Aro both directly and through CTR.

The District Court mistakenly interpreted the affidavit of AB's counsel as "specifically den[ying] that the Corporation [AB] has ever done business in Massachusetts (R. 20)." What the affidavit actually stated is, "The said corporation has never maintained an office or other place of business in Massachusetts (R. 14)."

The Court of Appeals apparently accepted the statement in the affidavit of AB's counsel that AB and CTR "are entirely separate and distinct (R. 10)", *infra* 28, although (1) CTR was not formed until the month it brought suit against Aro (75:13); (2) CTR sued Aro on the Massachusetts Territorial Grant conferred by AB that month (I:7); (3) CTR never paid AB for the "Massachusetts Territorial Grant (75:20);" (4) AB added the rest of the rights in the United States to the Massachusetts Territorial Grant (75:33-34, 38-39) 10 days after the Court of Appeals had affirmed (III:656) the injunction against the sale of unpatented replacement fabrics (I:44), and CTR promptly sought to enforce those additional rights against Aro in the Massachusetts District Court; (5) AB retained the license rights calling for royalty payments although paper title was then in CTR (75:36); (6) CTR authorized AB to enter licensing agreements with replacement fabric

manufacturers, including one in Massachusetts, under the "Massachusetts Territorial Grant" under which CTR sued Aro in exchange for only nominal consideration of $1.00 from AB (75:30, 35, 36-37); (7) CTR's treasurer and one of its three shareholders (75:13) is AB's accountant (75:20-21); (8) AB and CTR are represented by William D. Hall (75:31) and Elliott I. Pollock (I:13), partners in the patent law firm of Moore, Hall and Pollock (75:25); (9) the president of CTR is the wife of Pollock (R. 18; 75:13), and the three directors of AB were Nelson Moore of that patent law firm, his wife, Naomi, and William D. Hall's wife, Louise (75:19, 22); and (10) CTR has done no business except sue Aro in Massachusetts under one of AB's two combination patents (III:628, 635-36), CTR executed agreements authorizing AB to license the sale of replacement fabrics under CTR's "Massachusetts Territorial Grant" for the nominal consideration of $1.00 (75:35, 36-37), and CTR sought to license Aro under both AB patents (R. 15).

Neither the District Court, which did not cite the Clayton Act, nor the Court of Appeals cited any decision of this Court interpreting what "transacts business" means in section 12 of the Clayton Act. 38 Stat. 736 (1914), 15 U.S.C. § 22 (1958). *Infra* 31. Neither the District Court nor the Court of Appeals cited any decision of the Massachusetts Supreme Judicial Court interpreting the Massachusetts statutes authorizing service of process on foreign corporations. *Infra* 31-32. The District Court mentioned Aro's reliance on the opinion,[2] *infra* 33-35, of Judge Wyzanski in *Riddio Shack Corp.* v. *Lafayette Radio Electronics Corp.*, 182 F.Supp. 717 (D. Mass. 1960) (R. 20), but the District Court did not explain why the case at bar was not within the orbit of Judge Wyzanski's statement of the Massa-

[2] Appendix C, *infra* 33-35, reproduces verbatim Judge Wyzanski's statement of the applicable Massachusetts law governing service of process on a foreign corporation.

chusetts decisional law construing the Massachusetts statutes authorizing service of process on foreign corporations.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with both decisions of this Court interpreting section 12 of the Clayton Act. Nearly 40 years ago this Court ruled that section 12 treated a corporation as transacting business in a district "if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character . . . [for] a corporation is nonetheless engaged in transacting business in a district, within the meaning of this section—which deals with suits respecting unlawful restraints upon interstate trade—because of the fact that such business may be entirely interstate in character and be transacted by agents who do not reside within the district." *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 373 (1927). Although the activities of AB in collecting royalties from one Massachusetts replacement fabric manufacturer, demanding them from Aro and suing Aro on a Massachusetts Territorial Grant assigned to CTR through CTR may be interstate in character, it is difficult to reconcile the statement of the court below "there is no proof here that . . . [AB attempted to license and does license manufacturers and sellers of unpatented replacement fabrics] *in Massachusetts*", *infra* 29, with the official records in this Court and the courts below establishing at least (1) AB tried to collect royalties from Aro in Massachusetts; (2) when Aro refused to pay, CTR was formed, AB gave CTR a Massachusetts Territorial Grant under only one of its two combination patents, and suit was brought against Aro in Massachusetts in the name of CTR which suit is still pending and has been actively pursued for nearly ten years; (3) after that suit was temporarily successful, AB entered into

a licensing contract with a Massachusetts replacement fabric manufacturer licensing the sale of fabrics, which license, so far as any record shows, is still in existence; (4) ten days after the Court of Appeals affirmed this temporary success, AB gave CTR the rest of the territorial rights in the patent which additional rights CTR promptly asserted against Aro in the Massachusetts suit while AB retained the license rights calling for royalty payments; and (5) CTR executed agreements letting AB license others, including a Massachusetts manufacturer, to sell replacement fabrics under CTR's "Massachusetts Territorial Grant" in exchange for nominal consideration of $1.00. It is difficult to see how it would be possible for a patent holding company like AB with only two combination patents on convertible automobile automatic folding tops to transact much more business in Massachusetts. By the strictest interpretation of the tests laid out by this Court in *Eastman Kodak,* AB's direct solicitation of royalty payments from Massachusetts citizens, AB's direct licensing of one Massachusetts replacement fabric manufacturer and its suit against the other, Aro, through its agent CTR maintained in Massachusetts for nearly ten years must be characterized as being "of any substantial character."

The decision of the court below is even in more direct conflict with *United States* v. *Scophony Corp.,* 333 U.S. 795 (1948). There the Court found a foreign corporation transacted business in New York related only to the exploitation of its patents. The Court followed *Eastman Kodak* in explaining that since the enactment of section 12, "A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed and then by retreating or even without retreating[19] to its headquarters defeat or delay the retribution due." *Id.* 808. The Court explained in footnote 19:

> *I.e.*, by artful arrangement of agents' authority, or of their comings and goings, or of the geography of minute incidents in contracting. . . . Such artifice saw its day end for creating substantive liability through a course of dealing contrary to the antitrust statutes, but without also creating venue to enforce it, with the advent of § 12.

In refusing to accept an argument that Scophony's only business related to exploiting its patents, the Court said, "It would be also to ignore the fact that Scophony then and there was carrying on largely, if not exclusively, the only business in which it could engage at the time." *Id.* 810.

2. It would seem to be a fundamental principle of federal statutory construction that a lower court interpreting a federal statute that has previously been interpreted by this Court should refer to the decisions of this Court interpreting such a statute. By interpreting section 12 of the Clayton Act without referring to the decisions of this Court in *Eastman* and *Scophony* the court below made a complete departure from the accepted and usual course followed by lower courts of interpreting federal statutes by referring to applicable decisions of this Court.

3. The decision of the court below is directly in conflict with the decision of the Ninth Circuit Court of Appeals in *Guisti* v. *Pyrotechnic Industries,* 156 F.2d 351, *cert. denied,* 329 U.S. 787 (1946) construed most narrowly. The Ninth Circuit Court of Appeals ruled that an antitrust law action was properly brought in a district where the conspiracy had its impact against the plaintiff by concluding that the acts of one co-conspirator defendant in the district in furtherance of the conspiracy's attempt to harm the plaintiff's business was sufficient to vest the court with jurisdiction over the foreign corporate co-conspirator. That

decision is nothing more than a recognition of the fundamental rule of criminal law that one co-conspirator is the agent of the other when acting in furtherance of the conspiracy. Violations of the antitrust laws are criminal acts. The acts of CTR in furtherance of the conspiracy with AB to exact tribute from the sale of unpatented replacement fabrics in Massachusetts by Aro render AB subject to jurisdiction in Massachusetts under the authority of *Guisti*[3].

4. The instant case presents an important question of federal law which would seem to have constitutional dimensions concerning the proper procedure to be followed in determining jurisdictional facts when a jury trial on all issues has been demanded. We have no quarrel with the statement of the court below that the burden of proving jurisdictional facts is upon the plaintiff. *Infra* 28. But we do believe that conformity with the due process provision of the Fifth Amendment requires, and lower courts have consistently held, that on a motion to dismiss of this type decided before the moving defendant even answers, if the allegations in the complaint and the inferences most favorable to the plaintiff to be drawn from the record support a conclusion that the court has jurisdiction over the defendant, it is improper to grant a motion to dismiss.

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[3] The decision of the court below is in conflict with the Ninth Circuit decision in *Guisti*, even if construed narrowly to hold that the acts of the resident co-conspirator in furtherance of the conspiracy must also represent acts in furtherance of the business of the foreign co-conspirator to subject the foreigner to suit in the district. The suit of CTR on the Massachusetts Territorial Grant, still being maintained by CTR, unquestionably aided AB in exacting royalty payments from replacement fabric manufacturers on the sale of the unpatented replacement fabrics. While the Second Circuit Court of Appeals has apparently been unwilling to accept the broad proposition that the mere presence of a co-conspirator agent in the district renders the foreign co-conspirator amenable to suit there, *Bertha Building Corp.* v. *National Theatres Corp.*, 248 F.2d 833, 836 (2d Cir. 1957), *cert. denied*, 356 U.S. 936 (1958), there is nothing in that decision which indicates disagreement with the actual holding of *Guisti*.

Haleiwa Theatre Co. v. *Forman,* 37 F.R.D. 62 (D. Hawaii 1965); *Canuel* v. *Oskoian,* 23 F.R.D. 307, 313 (D.R.I. 1959); *Noerr Motor Freight Co.* v. *Eastern R.R. Presidents Con.,* 113 F.Supp. 737, 745-46 (D. Pa. 1953); *McGhan* v. *F. C. Hayer Co.,* 84 F.Supp. 540 (D. Minn. 1949); *Rudolph* v. *Eisen,* 38 F.Supp. 868 (D.N.J. 1941). The different result reached by the court below, which placed emphasis on absence of "proof" in a record for a hearing on a preliminary motion, *infra* 29, has effectively deprived Aro of its constitutional right to trial by jury and forbidding reexamination of any fact tried by a jury other than according to the rules of the common law preserved by the Seventh Amendment. *Cf., Bertha Bldg. Corp.* v. *National Theatres Corp.,* 248 F.2d 833 (2d Cir. 1957), *cert. denied,* 356 U.S. 936 (1958).

It is true that this Court has left the mode of determining a jurisdictional issue to the trial court. *Land* v. *Dollar,* 330 U.S. 731, 735 n.4 (1947); *Gibbs* v. *Buck,* 307 U.S. 66, 71-72 (1939); *K.V.O.S. Inc.* v. *Associated Press,* 299 U.S. 269, 278 (1936); *McNutt* v. *General Motors Corp.,* 298 U.S. 178, 184-85 (1936); *Gilbert* v. *David,* 235 U.S. 561, 576 (1915); *Wetmore* v. *Rymer,* 169 U.S. 115, 120-21 (1898), but in none of these cases does it appear as if failure to grant a trial represented a violation of due process or was the question raised that failure to have the jurisdictional facts determined by a jury represented a deprivation of the constitutional right to trial by jury. Only *Wetmore* and *Gilbert* involved jury trials. In *Wetmore* a want of jurisdiction for lack of jurisdictional amount in controversy was found after a hearing following a jury verdict after full trial awarding the plaintiff $1.00. In *Gilbert* there was a full trial without jury on citizenship. While the plaintiff complained that the jury should have decided the fact of citizenship, the constitutional problem was not discussed in the reported arguments of counsel or opinion of the Court.

And in *Gibbs* the Court held that where facts set out in the bill of complaint are not denied by motion or otherwise, "the facts set out in the bill are left unchallenged for the court to accept as true without further proof." 307 U.S. at 72. The apparent failure of the courts below to accept the unchallenged allegations of fact in the complaint as true is therefore in conflict with *Gibbs*.

Since the lower court decisions cited seem to have adopted a procedure of resolving disputed questions of jurisdictional facts at trial, it may now be appropriate for this Court to announce a uniform procedure for finding jurisdictional facts consistent with the constitutional requirements for due process and trial of facts by jury preserved in the Bill of Rights. Even if trial courts are allowed wide discretion in ascertaining the truth of allegations made in a complaint or upon information and belief in an affidavit, elementary concepts of due process would seem to at least require a trial court to acknowledge the existence of allegations supported by official records in that court in a case that has been reviewed twice by this Court.

It is apparent that the proper procedure for determining jurisdictional facts is of general importance in every case brought in a federal court. And one of the most important considerations in assigning appellate jurisdiction to this Court is to maintain uniform standards of federal procedure to be followed throughout the nation's federal courts. The consideration as to whether the uniform federal procedure for resolving questions of jurisdiction requires a jury determination of jurisdictional facts is an additional reason for granting review in this case.

5. Just as it is usual and accepted for lower courts to look at the decisions of this Court in interpreting a federal statute, it is also usual for federal courts interpreting state statutes to refer to the decisions of the highest court of that state in interpreting the statute. Although the court below

cited the Massachusetts statute authorizing service on the Commissioner of Corporations, *infra* 28-29 n.2, the opinion is devoid of even a single reference to decisions of the Massachusetts Supreme Judicial Court. In failing to refer to decisions of the Massachusetts Supreme Judicial Court on questions of interpreting Massachusetts statutory law authorizing service of process on a foreign corporation, the court below made a complete departure from the accepted and usual policy of federal courts looking to decisions of the highest state court in interpreting a state statute.

6. The decision of the court below in concluding that service on the Commissioner of Corporations as agent of AB was improper is in conflict with the applicable Massachusetts law correctly set forth by Judge Wyzanski in *Radio Shack Corp.* v. *Lafayette Radio Electronics Corp.*, 182 F.Supp. 717 (D. Mass. 1960). *Infra* 33-35. The applicable Massachusetts substituted service of process statute, MASS. GEN. LAWS ch. 181, §3A, *infra* 31-32, deemed a corporation which does business in Massachusetts, but has not expressly authorized the Commissioner of Corporations as its agent to receive process, to have authorized the Commissioner of Corporations to receive service of process upon the corporation in relation to any cause of action or proceeding arising out of such business. It is manifest that this cause of action arises out of the business of AB and its agent CTR in their efforts to illegally collect royalty payments from Aro on the sale of unpatented replacement fabrics. Judge Wyzanski concluded that "the Massachuetts court regards mere solicitation of business by a foreign corporation as an adequate basis for service of process under c. 181 § 3A in cases arising out of such solicitation." 182 F. Supp. at 720, *infra* 35. If mere solicitation of mail order interstate business is sufficient to render a foreign corporation subject to service under the Massachusetts statutory law as to causes of action arising from such solicitation, *a*

fortiori the repeated solicitations of royalty payments by AB and CTR from Aro in Massachusetts, the maintenance of the suit against Aro since April 1956 in Massachusetts right up to the present, and the existence of a licensing contract between AB and a Massachusetts replacement fabric manufacturer calling for the payment of royalties on the sale of unpatented replacement fabrics surely makes AB amenable to service of process under applicable Massachusetts law.

7. The decision of the court below is also in conflict with MASS. GEN. LAWS Ch. 223, § 38, *infra* 32, expressly providing that in an action against a foreign corporation "soliciting business in the commonwealth, permanently or temporarily" service may be made as upon a domestic corporation. *Jet Mfg. Co.* v. *Sanford Ink Co.*, 330 Mass. 173 (1953); *Wyshak* v. *Anaconda Copper Mining Co.*, 328 Mass. 219 (1952). In *Wyshak*, Wilkins, J. said at p. 223, "We perceive no reason why mere solicitation should be . . . insufficient under the statute providing for service upon foreign corporations."

Service upon a domestic corporation may be made upon its agent in charge of its business. MASS. GEN. LAWS ch. 233, § 37, *infra* 32. In the case at bar AB's agent in Massachusetts for soliciting royalty payments from Aro through the suit on one combination patent of AB and offers of licensing contracts under both AB's patents was CTR. *Schmikler* v. *Petersime Incubator Co.*, 77 F.Supp. 11 (D. Mass. 1948). And, Paul V. Power, the Massachusetts attorney of CTR and hence the individual in charge of AB's solicitation in Massachusetts, was a proper person to serve. *Scholnik* v. *National Airlines*, 219 F.2d 115, 120 (6th Cir.), *cert. denied*, 349 U.S. 956 (1955). Insofar as the courts below concluded that Power was not the proper party to serve, the decision of the court below is in con-

flict with the latter decision of the Sixth Circuit Court of Appeals.

9. The instant case is important in deciding whether the amenability of a foreign corporation to service of process in a diversity action is a question of state law to be followed by a federal court sitting in that state or of federal law. The rationale of *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64 (1938) might seem to call for reference to state law. The Second Circuit Court of Appeals, sitting en banc, reached such a result without relying on *Erie. Arrowsmith* v. *United Press International,* 320 F.2d 219 (2d Cir. 1963). Yet the decision of this Court in *Riverbank Laboratories* v. *Hardwood Products Corp.,* 350 U.S. 1003 (1956) has been interpreted as requiring reference to federal law embracing standards of amenability set forth in *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945). *K. Shapiro, Inc.* v. *New York Central R.R.,* 152 F.Supp. 722, 725 (E.D. Mich. 1957). If the court below was applying federal law in determining AB's amenability to service of process in referring to the decision of the Second Circuit Court of Appeals in *Echeverry* v. *Kellog Switchboard & Supply Co.,* 175 F.2d 900, 903 (2d Cir. 1949), *infra* 29, instead of the Massachusetts decisional law[4], the decision of the court below is in conflict with the Second Circuit decision in *Arrowsmith.* If the court below was applying federal law and federal law should be applied, the decision of the court below is in conflict with the standards of *International Shoe* ruling that a corporation may be sued in a forum if its contacts with the forum state are sufficient so as not to

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[4] In *Echeverry* the court said, "Incidentally, none of the transactions which are alleged to have given rise to the claims or causes in action herein involved (which were assigned to the plaintiff), arose or took place in the State of New York." 175 F.2d at 902. In the case at bar the transactions alleged to have given rise to the cause of action took place in or relate directly to Massachusetts.

offend traditional concepts of fair play and substantial justice.[5]

In *Aro II* MR. JUSTICE BLACK said, "Entrepreneurs in the new corporate business of suing for infringements (Aro claimed that Convertible was such a corporation, set up with no other function) may soon become as common as patents themselves." 377 U.S. at 530 (dissenting opinion). To allow such a shell suing corporation as CTR to shield AB from answering in Massachusetts for the harm which AB caused Aro over these many years extends the shielding effect of the corporate veil created by law to embrace conduct in violation of law so as to bar vindication of rights of Massachusetts citizens in Massachusetts where the thrust of AB's criminal conduct wounded and nearly killed Aro. The layman might well stand in awe of the ingenuity in forming an assetless shell corporation like CTR to act as AB's sword against Aro in Massachusetts and as AB's shield against having to answer for its conduct in Massachusetts, but allowing the decision of the court below to stand breeds no respect for a legal system that permits such an illogical result. It is important that this Court discourage other enterpreneurs in the new corporate business of suing for infringments from forming suing corporations by making AB answer for its conduct in Massachusetts where the harm was perpetrated against Aro. Correcting the decision of the court below is consistent with *International Shoe's* traditional concepts of fair play and substantial justice. Leaving the decision uncorrected offends these concepts.

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[5] For a discussion of the problem of what law determines whether a foreign corporation has had sufficient contacts with a state to make it subject to the jurisdiction of the federal court sitting in the state and the unclear status of this area of the law, see 2 MOORE, FEDERAL PRACTICE 1176-83 (2d ed. 1965) criticizing *Arrowsmith* and explaining that while service under FED. R. CIV. P. 4(d)(7) may call for reference to state law, FED. R. CIV. P. 4(d)(3) ought to embrace reference to federal law.

10. The instant case is of general importance both from the standpoint of clarifying important questions of general jurisdictional law and for promoting the national policy underlying section 12 of the Clayton Act of making it possible for a small businessman who has been hurt in his own state as a result of activities conducted there by a foreign corporation to have the foreign corporation answer for its misconduct in the area where the injured small businessman resides. This case is particularly appropriate for review by this Court to resolve these questions because the Court's previous exposure in *Aro I* and *Aro II* to the activities underlying this case and the conciseness of the instant record should aid the Court in reaching a sound decision as a result of the high ratio of time considering law to time acquiring the factual base.

CONCLUSION

For at least the foregoing reasons, the motion for leave to use the record in *Aro I* and *Aro II* and the petition for writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 1966.

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 6551.

ARO MANUFACTURING CO., INC., Et Al.,

PLAINTIFFS, APPELLANTS,

v.

AUTOMOBILE BODY RESEARCH CORPORATION,

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,* HAMLIN, *Senior Circuit Judge,** and MCENTEE, *Circuit Judge.*

Charles Hieken, with whom *David Wolf* and *Wolf, Greenfield & Hieken* were on brief, for appellants.
Stephen A. Moore for appellee.

OPINION OF THE COURT.

November 9, 1965.

MCENTEE, *Circuit Judge.* This is a suit for alleged Federal Anti-Trust Act violations brought by two Massachusetts plaintiffs, Aro Manufacturing Company and Aro Top Sales Company, (both hereinafter called Aro) against three defendants, one of which is appellee, Automobile Body Research Corporation (hereinafter called Automobile Body). The case is before us on appeal of Aro from an order of the district court dismissing the suit against Automobile Body for lack of jurisdiction.

Automobile Body is a Maryland corporation. It is not

*Sitting by designation.

registered to do business in Massachusetts. Its principal assets are two combination patents covering convertible automobile folding top mechanisms. This corporation does not manufacture or sell any products of any kind. Its business consists of assigning rights in these patents and collecting royalties thereon. Aro makes and sells unpatented replacement fabrics for automobile tops. Service of process in this case was purported to have been made on the defendant, Automobile Body, in Massachusetts, by serving a summons on one Paul V. Power, the Massachusetts attorney for the defendant, Convertible Top Replacement Company (hereinafter called Convertible Top). This corporation, Aro contends, is the agent or alter ego of Automobile Body in Massachusetts. Service was also purported to have been made on Automobile Body by serving a summons on the Massachusetts Commissioner of Corporations and Taxation. In support of its motion to dismiss, the treasurer of Automobile Body submitted an affidavit stating, amongst other things, that neither he, as treasurer or as agent for service, nor any of the other officers of the corporation have received any service in connection with this suit; that the officers and directors of Automobile Body, all of whom live in Maryland, do not travel outside of that state on company business; that from an examination of all correspondence of Automobile Body for a period of six months prior to the date of his affidavit (May 23, 1962) he found no record of any correspondence with anyone in Massachusetts; and that this corporation has never maintained an office or other place of business in Massachusetts. With reference to Convertible Top, the affidavit flatly states that none of the officers, employees, directors or stockholders of Automobile Body have ever had any position or connection with Convertible Top and that these two corporations are entirely separate and distinct. The affidavit further states that Automobile

Body has never directly or indirectly retained Attorney Power in any connection and he has never been a representative or agent of Automobile Body for any purpose whatsoever. The oral testimony of Attorney Power at the hearing on the motion corroborated this statement. Aro contends that Automobile Body itself does business directly in Massachusetts and also indirectly through its agent and alter ego, Convertible Top. In support of these contentions Aro's attorney filed a counter affidavit, most of which is based upon information and belief, in which he asserts, among other things that Convertible Top was set up as a "shell" or "dummy" corporation for the purpose of bringing suit on behalf of Automobile Body against Aro in Massachusetts for patent infringement. This counter affidavit further states that prior to the formation of Convertible Top, Automobile Body had attempted to collect royalties from Aro on these patents and that on several occasions the patent attorney for Convertible Top submitted proposed license agreements to Aro's attorney with reference to the patents then owned by Automobile Body.

There are two basic questions involved in this case: (1) service of process and (2) venue. Inasmuch as service of process is the vehicle by which the court may obtain jurisdiction, we shall consider first the question of service. The venue provision of the Clayton Act,[1] under which this suit is brought, also provides where process in such suit may be served. In suits under this statute, service on a foreign corporation is also valid if made in the manner

[1] 15 U.S.C. § 22 provides:

"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

prescribed by the law of the state in which service is made. Fed. R. Civ. P. 4(d)(7).

The district court in granting defendant's motions to dismiss for lack of jurisdiction, held that service upon Attorney Power was not authorized by Automobile Body and also that an attempt to collect royalties for an alleged patent infringement does not constitute "doing business" within the meaning of the Massachusetts statute so as to permit service of process on the Commissioner of Corporations and Taxation.

From an examination of the record it is clear that Attorney Power was not authorized to accept service for Automobile Body. Furthermore the record is devoid of proof that Convertible Top is the agent of Automobile Body. The allegation of agency here is a mere conclusion. There is no indication of the source of this information or of the dates or the frequency with which Convertible Top so acted. The affidavit presented on behalf of Automobile Body specifically stated that these two corporations are entirely separate and distinct. The burden of proving jurisdictional facts is upon the plaintiff. *Kvos, Inc.* v. *Associated Press,* 299 U.S. 269 (1936) and *McManus* v. *Capital Airlines,* 166 F.Supp. 301 (E.D.N.Y. 1958). Thus, we agree with the district court that service upon Power was insufficient to confer jurisdiction over Automobile Body.

Whether or not the service on the Commissioner of Corporations was sufficient service on Automobile Body pursuant to chapter 181, section 3 of the Massachusetts General Laws[2] depends on whether Automobile Body is

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[2] Chapter 181, Section 3, Mass. Gen. Laws, provides in part:

"Every foreign corporation, which does business in this commonwealth . . . shall before doing business in this commonwealth, in writing, appoint the secretary of state . . . to be its true and lawful attorney upon whom all lawful process in action or proceeding against it may be served. . . ." (Previous to the 1962

doing business in the Commonwealth. No general definition can be made of the phrase "doing business" in a state statute relating to service on a foreign corporation. What constitutes "doing business" must be decided on the particular facts of each case. *Echeverry* v. *Kellogg Switchboard & Supply Co.*, 175 F.2d 900, 903 (2d Cir. 1949).

In support of its contention that Automobile Body does business directly in Massachusetts the counter affidavit submitted by the attorney for Aro states, on information and belief, that Automobile Body attempts to license and does license manufacturers and sellers of unpatented replacement fabrics. This is another mere conclusory allegation. It has been suggested that since Automobile Body's only business is to assign patents and collect royalties and since this is all it does, for it this constitutes "doing business." Even if this is true there is no proof here that this corporation did these things *in Massachusetts.*

Even if the activities of Convertible Top in Massachusetts can be construed as doing or transacting business there, and assuming that Convertible Top is a subsidiary of Automobile Body, this would not be dispositive. Automobile Body was not doing or transacting business in Massachusetts merely because its subsidiary was. *Cannon Mfg. Co.* v. *Cudahy Co.*, 267 U.S. 333, 336 (1924); *People's Tobacco Co.* v. *Am. Tobacco Co.*, 246 U.S. 79, 87 (1918). Nor is there any proof in this case that Convertible Top is a

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amendment, this section provided that process would be made to the Commissioner of Corporations).

Chapter 181, § 3A, Mass. Gen. Laws, provides in part:

"Any such corporation which does business in this Commonwealth without complying with the provisions of section 3, . . . shall, . . . be deemed and held, in relation to any cause of action or proceeding arising out of such business, to have appointed the commissioner and his successor in office to be its true and lawful attorney, and any process in any such action or proceeding against it served upon the commissioner or his successor in office shall be of the same legal force and validity as if served on such corporation."

"dummy" or an instrumentality of Automobile Body. At most, it is a subsidiary.

We also find that there is no valid service here under the provisions of Section 12 of the Clayton Act. 15 U.S.C. § 22. (See footnote 1) Service under this section is valid only if the defendant is served in the district of which it is an inhabitant, or wherever it may be found. The word "inhabitant" is synonymous with "resident." A corporation is a resident of the state in which it is incorporated and obviously Automobile Body is not a resident of Massachusetts. *Shaw* v. *Quincy Mining Co.*, 145 U.S. 444 (1892); *Suttle* v. *Reich Bros. Construction Co.*, 333 U.S. 163 (1947). Nor can it be maintained that Automobile Body is "found" in Massachusetts. When applied to a corporation this statutory requirement is the equivalent of saying that it must be present there by its officers and agents carrying on the business of the corporation. In this way only can a corporation be said to be "found" within the district. *People's Tobacco Co.* v. *Am. Tobacco Co., supra* at 84. Since there is insufficient proof that Automobile Body is doing business in Massachusetts it cannot be said to be "found" there.

Inasmuch as there has been no valid service of process on Automobile Body it is unnecessary for us to consider the question of venue. No other questions raised in the briefs need be considered.

Affirmed.

APPENDIX B

STATUTES INVOLVED

Clayton Act:

> Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
>
> Sec. 12. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

Title 28, United States Code:

> § 1391(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

Massachusetts General Laws:

> Ch. 181, § 3. Every foreign corporation, which does business in this commonwealth . . . shall before doing business in this commonwealth, in writing, appoint the commissioner and his successor in office . . . to be its

true and lawful attorney upon whom all lawful process in actioin or proceeding against it may be served. . . .

§ 3A. Any such corporation which does business in this Commonwealth without complying with the provisions of section 3, . . . shall, . . . be deemed and held, in relation to any cause of action or proceeding arising out of such business, to have appointed the commissioner and his successor in office to be its true and lawful attorney, and any process in any such action or proceeding against it served upon the commissioner or his successor in office shall be of the same legal force and validity as if served on such corporation.

Ch. 223 § 37. In an action against a domestic corporation . . ., service shall be made upon the president, treasurer, clerk, cashier, secretary, agent or other officer in charge of its business, or, if no such officer is found within the county, upon any member of the corporation.

§ 38. In an action against a foreign corporation, except an insurance company, which has a usual place of business in the commonwealth, or, with or without such usual place of business, is engaged in or soliciting business in the commonwealth, permanently or temporarily, service may be made in accordance with the provisions of the preceding section relative to service on domestic corporations in general, instead of upon the commissioner of corporations and taxation under section three or section three A of chapter one hundred and eighty-one.

APPENDIX C

JUDGE WYZANSKI'S STATEMENT OF THE MASSACHUSETTS DECISIONAL LAW CONSTRUING MASSACHUSETTS STATUTES AUTHORIZING SERVICE OF PROCESS ON FOREIGN CORPORATIONS

From the foregoing facts this Court finds as facts that the New York corporation did solicit business within this Comonwealth and also did business here.

Rule 4(d) (7) of the Federal Rules of Civil Procedure, 28 U.S.C.A., provides that service of process on a foreign corporation is valid if made in the manner prescribed by the law of the state in which service is made. Pulson v. American Rolling Mill Co., 1 Cir., 170 F.2d 193, 194.

With respect to a foreign corporation which continuously solicits business in its commonwealth Massachusetts has the constitutional power to provide for service at least with respect to causes of action arising out of that solicitation. International Shoe Co. v. State of Washington, 326 U.S. 310, 317, 66 S.Ct. 154, 90 L.Ed. 95. And G.L. c. 223, § 38 expressly provides that in an action against a foreign corporation "soliciting business in the commonwealth, permanently or temporarily" service may be made as upon a domestic corporation. Jet Mfg. Co. v. Sanford Ink Co., 330 Mass. 173, 112 N.E.2d 252; Wyshak v. Anaconda Copper Mining Co., 328 Mass. 219, 103 N.E.2d 230. In Wyshak, Wilkins, J., said in 328 Mass. at page 223, 103 N.E.2d at page 232, "We perceive no reason why mere solicitation should be * * * insufficient under the statute providing for service upon foreign corporations."

Service upon a domestic corporation may be made upon its agent in charge of its business. G.L. c. 223 § 37. In the case at bar the New York corporation's agent for soliciting by catalog and by flyer business in Massachusetts was the

Massachusetts corporation. Schmikler v. Petersime Incubator Co., D.C.Mass., 77 F.Supp. 11. And Seifert, the general manager of that Massachusetts corporation and hence the individual in charge of the New York corporation's solicitation in Massachusetts, was a proper person to serve. Scholnik v. National Airlines, 6 Cir., 219 F.2d 115, 120. Therefore plaintiff correctly followed one of the statutory ways to serve defendant.

Plaintiff also sought to follow another way which Massachusetts statutes provide.

G.L. c. 181 § 3 requires that every foreign corporation which does business in this Commonwealth shall appoint as its attorney for the service of process the comissioner of corporations and taxation. G.L. c. 181 § 3A provides that any such corporation which does business in the Commonwealth without complying with the provisions of section 3 shall be deemed, in relation to any cause of action arising out of such business to have appointed the commissioner as its attorney for the service of process.

The language of this section is sufficiently broad to cover the case at bar. For, as the findings indicate, the New York corporation did a large volume of business in this Commonwealth by using a subsidiary to solicit mail order business for the New York corporation from Massachusetts customers who received catalogs and flyers at the subsidiary's place of business; and this cause of action arises in part out of that business. To be sure, the business was interstate commerce. And at a time when it was thought that such business could not constitutionally furnish a basis for local jurisdiction the Massachusetts statute was interpreted as not going as far as a literal reading would indicate. Thurman v. Chicago, M. & St. P. Ry., 254 Mass. 569, 151 N.E. 63, 46 A.L.R. 563. Even after it became clear that there was no constitutional obstacle to giving the Massachusetts statute a reading as broad as its letter, the federal

courts, in the absence of a green light from the state courts, hesitated to depart from the Thurman case. Pulson v. American Rolling Mill Co., 1 Cir., 170 F.2d 193. But it seems that the state court has now given a green light. In Remington Arms Inc. v. Lechmere Tire and Sales Co., Mass., 158 N.E.2d 134, Chief Justice Wilkins, while stating that the Massachusetts courts would not re-examine constructions that court had heretofore placed on §§ 3, 5, and 12 of c. 181, showed a willingness to accept a party's concession that § 3A, the section governing service of process upon the commissioner, should now be interpreted in the light of Wyshak v. Anaconda Copper Mining Co., 328 Mass. 219, 103 N.E.2d 230. If I understand aright the opinion of Chief Justice Wilkins this means that today the Massachusetts court regards mere solicitation of business by a foreign corporation as an adequate basis for service of process under c. 181 § 3A in cases arising out of such solicitation. And if this construction be correct, then the service on the commissioner in the case at bar was appropriate and does confer jurisdiction over the New York corporation.